1978

Debry and Hilton Travel Services, Inc. v. Capitol International Airways, Inc. : Brief of Respondent in Opposition to Petition for Rehearing

Utah Supreme Court

Philip K. Fishler; Strong & Hanni; Attorneys for Defendant and Respondent;
Clark W. Sessions; Watkiss & Campbell; Attorneys for Plaintiff and Appellant;

IN THE SUPREME COURT

OF THE STATE OF UTAH

DEBRY AND HILTON TRAVEL SERVICES, INC.,

Plaintiff-Appellant,

vs.

CAPTIOL INTERNATIONAL AIRWAYS, INC.,

Defendant-Respondent.

Case No. 15219

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR REHEARING

PHILIP R. FISHLER
STRONG & HANNI
Attorneys for Defendant-Respondent
604 Boston Building
Salt Lake City, Utah 84111

CLARK W. SESSIONS
WATKISS & CAMPBELL
Attorneys for Plaintiff-Appellant
Twelfth Floor
310 South Main Street
Salt Lake City, Utah 84101

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WATKISS & CAMPBELL
Attorneys for Plaintiff-
Appellant
Twelfth Floor
310 South Main Street
Salt Lake City, Utah 84101

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RESPONDENT'S BRIEF IN OPPOSITION
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ARGUMENT

DeBry and Hilton Travel Services, Inc., (DeBry) complains that instruction no. 28 given by the trial court did not sufficiently inform the jury that the duty to mitigate damages arises after a breach of contract. This breach may arise either by anticipatory repudiation or failure to perform at the time that performance is due.

That part of instruction no. 28 which DeBry complains of states as follows:

> . . .as soon as the aggrieved party learns that the other party, or should have learned that the other party, will not perform, that party must begin to mitigate his damages.

This should be compared with the instruction that DeBry offered at trial and which DeBry claims to more accurately state the law for the jury:

> The whole concept of mitigation turns on the idea that a damaged party should pursue a course, after a breach, which is designed to assist the party in breach. (Record at 609.)

It is apparent that DeBry is playing a game with words i claiming that his proffered instruction states more clearly that the duty to mitigate arises after a breach. The instruction as given by the court, ". . .as soon as the aggrieved party learns. requires that the breach arise before the duty to mitigate arise DeBry's instruction adds nothing to that instruction already give by the court. If it had been added to the instruction given, it would have been redundant and would not have emphasized more ful the time which the duty to mitigate damages arises.

The standard for review of errors in jury instructions w articulated in the case of Rowley v. Graven Brothers & Co., Inc. 26 Utah 2d 448, 491 P.2d 1209 (1971). In that case, the court found that a phrase used in a negligence instruction had been previously referred to by the court as ill advised and improper. The court stated:

> Proceeding from that premise, the question yet remains as to whether there was error or impropriety which would justify reversing the judgment. The mandate of our law is that we do not reverse for mere error or irregularity. We do so only if the complaining party has been deprived of a fair trial. The test to be applied is: was there error or irregularity such that there is a reasonable likelihood to believe that in its absence there would have been a result more favorable to him? If upon a survey of the whole evidence this question must be answered in the negative, then there is no justifiable basis for reversal of a judgment. 491 P.2d at 1211.

Reviewing the instructions in question in the instant case reveals that there is not even an error or impropriety in the instruction which would require the court to make a review of the entire case. Even if the instruction could be considered as in error or irregular, a review of the case would undoubtedly reveal that there is no justifiable basis for reversal of a judgment. To reverse on the grounds of improper instructions, DeBry would be required to show that the result in the instant case would have been more favorable to it.

In its petition for rehearing DeBry has characterized the evidence as revealing only two points in time in which a jury could have found that a breach occurred. On the contrary, there are at least two other occasions on which the jury could have found an anticipatory breach occurred. DeBry instituted a declaratory action on this very contract as early as July of 1974. (Transcript, Day 2, p. 18.) In May of 1974 he revoked a previous instruction he had made with respect to a $1,000.00 deposit on the contract. (Exhibit 14P.) By the admission of Mr. DeBry, chairman of the board of DeBry and Hilton Travel Services, Inc., he claims to have made a list of alternative air carriers and submitted that to his secretary in July of 1974. (Transcript, Day 2, p. 58.) All of these instances could have been considered by the jury as evidence of a breach at the time of their occurrence. All of them were many months prior to the time that DeBry claims the breach must have occurred.

In essence, DeBry is attempting to invoke this court's reviewing powers a second time to substitute its judgment for

that of the jury and the trial court. As stated by this court:

> It needs no citation of authorities that if there is substantial evidence to support the judgment of the court below, we affirm. Leon Glazier & Sons, Inc. v. Larsen, 26 Utah 2d 429, 491 P.2d 227 (1971).

The instruction offered by DeBry at trial added nothing to the instruction already being given by the court. Therefore, this court was correct in concluding that DeBry offered no instruction to the court as to the date when its duty arose to mitigate the damages. Accordingly, DeBry's petition for rehearing should be denied.

CONCLUSION

The matters presented by DeBry's petition for rehearing have been fully considered by this court and DeBry's petition refers to no new matters or errors by this court. The complained of instruction was properly given and there was sufficient evidence at trial to support the jury verdict.

Therefore, Capitol International Airways, respondent herein requests that DeBry's petition for rehearing be denied and this court's prior decision be affirmed in its entirety.

Respectfully submitted this ____ day of September, 1978.

STRONG & HANNI

By _____
PHILIP R. FISHLER
Attorneys for Defendant-Respondent
604 Boston Building
Salt Lake City, Utah 84111

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief in Opposition to Petition for Rehearing were served upon the plaintiff-appellant by mailing the same, postage prepaid, to Clark W. Sessions, Wallace, Kiss & Campbell, Twlefth Floor, 310 South Main Street, Salt Lake City, Utah 84101, this ____ day of September, 1978.

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